No. 12,367

IN THE

United States Court of Appeals

For the Ninth Circuit

NICK KUPOFF, JAMES ZUKOEV, MIKE KITOFF, NICK KABAK, a partnership doing business under the firm name and style of North Star Mining Company,

Appellants,

vs.

VUKA RADOVICH STEPOVICH, Executrix of the Estate of Mike Stepovich, Deceased,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT.

That on the 13th day of February, 1942, Mike Stepovich entered into a written Lease with appellants, a copy of which was attached to the Second Amended Complaint on file herein. That appellants entered into possession of the North Star Mining claim described therein together with the mining property, buildings, tools and equipment of the said Mike

Stepovich which were upon said claim and agreed to pay as royalty for the rights and privileges under the said Lease, one-third of the gross amount of all gold and other precious metals from each and every clean-up held on said ground.

That on the 21st day of August, 1942, the said Mike Stepovich, Deceased, filed a Complaint in the District Court for the Territory of Alaska, Fourth Division, in which five causes of action were separately stated and in which he demanded judgment against appellants on the first cause of action in the sum of $2700.00, on the second cause of action in the sum of $133.50, on the third cause of action for the sum of $18.60, on the fourth cause of action the sum of $11.00, and on his fifth cause of action for the sum of $187.99. That an Answer was filed by appellants and a Reply by the said Mike Stepovich. (Tr. pp. 222-227.) That on the 24th day of November, 1942, a motion was made by E. B. Collins, attorney for the said Mike Stepovich, for a voluntary nonsuit, which motion was granted and the said appellants were awarded their costs and disbursements to be taxed by the Clerk of the Court.

That a Writ of Attachment was issued on the 21st day of August, 1942, based upon the affidavit of the said Mike Stepovich (Tr. p. 79) and the personal property of appellants was attached by the United States Marshal for the Fourth Division of the Territory of Alaska as shown by appellants' Exhibit "G". (Tr. p. 167.)

That the said appellants left said mining claim and abandoned the same on or about the 21st day of August, 1942, and ceased their mining operations.

That on the 21st day of September, 1944, more than two years after said appellants abandoned said claim, the said Mike Stepovich died. That thereafter his wife, Vuka Radovich Stepovich, was appointed executrix of the estate of the said Mike Stepovich, Deceased, and qualified as such executrix and continued to act as such and is now acting as the executrix of the estate.

That after the appointment of the said Vuka Radovich Stepovich as such executrix the said appellants filed a claim with her as executrix of said estate on the 6th day of July, 1945, which said claim was disallowed by her as such executrix (Tr. p. 112) and which said claim stated that the said Mike Stepovich unlawfully ousted appellants from said mining claim and that they had spent certain sums of money in preparation for mining operations in the sum of $6,791.29. No claim was made for the conversion of money or gold by the said Mike Stepovich and the claim was for anticipated profits in the sum of $100,000.00 and for money expended in the sum of $6,791.29.

That on the 15th day of October, 1945, appellants filed their Complaint herein and on the 20th day of October, 1947, filed their Second Amended Complaint, a copy of which is contained in the Transcript, p. 2.

That the case came on for trial and on the 12th day of January, 1949, Judgment was entered in favor of

the appellee and against the appellants. (Tr. pp. 23, 24, 25.)

That thereafter a Notice of Appeal was filed on the 6th day of April, 1949, more than 60 days after the entry of said Judgment.

POINTS AND AUTHORITIES.

The creditor's claim of appellants (Tr. p. 112) which was filed on the 6th day of July, 1945, and rejected by the Executrix of the estate of Mike Stepovich, Deceased, on the 16th day of July, 1945, was filed under the provisions of Section 61-13-4, Vol. 3, Alaska Compiled Laws Annotated, 1949.

The said section provides in part as follows:

> "The District Court or the Judge thereof shall have power to hear and determine in a summary manner all demands against any estate agreeably to the provisions of this Chapter, and which have been so rejected by the executor or administrator, and shall cause a concise entry of the order of allowance or rejection to be made on the record, which order shall have the force and effect of a Judgment, from which an appeal may be taken as in ordinary cases; Provided, No Claim which shall have been rejected by the executor or administrator, as aforesaid, shall be allowed by any court, judge, referee, or jury, except upon some competent or satisfactory evidence other than the testimony of the claimant. No claim shall be allowed by the executor or administrator or

> the District Court or judge which is barred by the statute of limitations."

The above section 61-13-4 as well as most of the Alaska Code was copied from the laws of Oregon and part of the section above quoted has been construed by the Supreme Court of Oregon in the case of *Smith v. Pottratz,* 77 Pac. (2d) p. 436. In this case on page 439 the Court makes the following statement:

> "It was incumbent on claimant to make a prima facie showing by corroborative testimony the extent and value of her alleged services; the amount and reasonable value of meat, vegetables, and other foodstuffs she claims to have furnished; the sums which were reasonable to allow her as fees and commissions; and the amount of money advanced by her. This, she has failed to do, except as to the item of $100 referred to by Franklin G. Pottratz as having been agreed to by decedent and the item of $18.95 for vegetables furnished in 1931 and called to the attention of claimant's mother."

There was no evidence offered at the trial of this case by appellants regarding any expenditures in any amount whatever in preparation for actual mining operations by appellants upon said mining claims. There was no evidence, competent or otherwise, of any kind tending to corroborate the testimony of appellants, Nick Kupoff or James Zukoev, as to them or any of the other appellants being ousted or ejected from the above described mining claim by Mike Stepovich, deceased, or by Pat O'Connor, Deputy United States Marshal, or by the United States Marshal for

the Fourth Division of the Territory of Alaska or any of his deputies. There was no evidence, competent or otherwise, that appellants suffered any damage of any kind on account of any act or acts of the said Mike Stepovich, deceased, or by the United States Marshal for the Fourth Division of the Territory of Alaska, or any of his deputies.

> "In an action for unlawful attachment not brought upon the attachment bond, the plaintiff must allege and prove that the attachment was sued out maliciously and without probable cause." *Mitchell v. Silver Lake Lodge* (29 Or. p. 294, 45 Pac. 798); (50 *C.J.* p. 622, Sec. 396); (6 *C.J.* p. 498, Sec. 1177.)

In the complaint filed by Mike Stepovich, deceased, against appellants, five causes of action were stated and the defendants admitted that they owed the money due under causes of action 2, 3, 4 and 5. One of the two appellants who appeared as witnesses admitted that he used the RD7 referred to in the first cause of action of said complaint (Tr. pp. 125-126), but denied that he owed anything for the use of said RD7 Caterpillar tractor. No competent testimony was offered to the effect that said accounts had not been assigned to the said Mike Stepovich, so it can not be said that the action was instituted without probable cause. There was no evidence that either Mike Stepovich or his attorney instructed the United States Marshal to oust or eject the appellants from the mining claim described in the reply. As a matter of fact, the appellants' own Exhibit "C" (Tr. p. 167) shows that Pat

O'Connor, deputy marshal, executed the Writ of Attachment by levying upon and taking into his possession personal property and appointing Emil S. Rylander as custodian. The Writ of Attachment introduced in evidence (Tr. p. 79) shows that the United States Marshal was merely instructed to attach and safely keep all of the property of the said defendants not exempt from execution, or so much thereof as may be sufficient to satisfy plaintiff's demand as above stated.

There is nothing in any of the authorities cited by appellants in their Brief to the effect that a Lessor cannot sue lessees and avail himself of the process of attachment and have the personal property of the lessees attached, unless the attachment is sued out maliciously and without probable cause.

In the case of *Dalton v. Kelsey* reported in 114 Pac. p. 464, we quote syllabus 2 as follows:

> "Where plaintiff and defendant had an agreement whose express purpose was to settle and establish the respective rights of the parties to the water and ditches therein mentioned, an action by plaintiff for interfering with his rights thereunder, in that defendant entered upon the ditch upon his own land and diverted water so that it failed to reach the lands of plaintiff, but did not enter upon the plaintiff's land, is an action on the case, and is barred in two years under L. O. L. 8, subd. 1, and is not an action on the contract or for trespass, which are barred in six years by L. O. L. 6, subd. 1."

"Remote or speculative damages cannot be recovered for breach of contract". (15 Am. Jur. p. 567, Sec. 153.)

United States v. Behan (110 U.S. p. 338). On page 334 of said opinion by the Supreme Court of the United States we find the following statement by the Court:

"The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses. The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consisted in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of Masterson v. Mayor of Brooklyn, 7 Hill, 69, they are 'the direct and immediate fruits of the Contract,' they are free from this objection; they are then 'part and parcel of the contract itself, entering into and consti-

tuting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfilment of any other stipulation.' Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such a remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense."

"Actual damages must be actually proved and cannot be assumed as a legal inference from any facts which do not amount to actual proof of the facts." (15 Am. Jur. p. 795, Sec. 356.) (152 U.S. p. 200.)

In the case of *Osage Oil & Refining Co. v. Chandler et al.* (Fed. Rep. Vol. 287, p. 848) the Court on page 852 makes the following statement:

"In general, it is no doubt true that the loss for which a recovery may be had in an action against a wrongdoer must be the result of the wrong inflicted. The party complaining must show, not only that he has suffered the loss, but also that it would not have been incurred, but for the wrongful act of his adversary; and the amount of the loss is as much to be proved by the plaintiff as the fact of the loss. All this is common learning."

Appellants have sued in this case for actual or compensatory damages according to the claim filed and the contention of appellants in their Brief.

The action of appellants for torts complained of in the Complaint is barred by the statute of limitations.

(Sec. 55-2-7, Alaska Compiled Laws, Annotated, 1949, Vol. 3, p. 1686.)

ARGUMENT.

Concerning the Brief for Appellants, a part of their argument is based on an action for violation of contract and part for an action in tort. It is possible that the Complaint may be construed as both an action for breach of contract and for tort but there is a distinction to the authorities cited above, particularly in regard to proof for damages for violation of contract and damages for tort.

It seems to be the theory of appellants that Mike Stepovich, deceased, ejected appellants from the mining claim described in the lease for the sole purpose of being able to convert large sums of money which they claimed were contained in the dump and to extract from the claim rich and valuable gravels in order to prevent appellants from recovering the same; notwithstanding the fact that he was to receive under the lease one-third of the gross amount of gold extracted by appellants in their mining operations. In considering this theory of the case it is necessary first to consider plaintiffs' Exhibit "B". (Tr. p. 52.) According to this statement which was introduced by appellants they had failed to pay royalty on the clean-ups prior to the 2nd day of August, 1942, to Mike Stepovich in the sum of $145.92; they had failed to pay for wood in the sum of $111.00; they had failed to pay the July

payment for the Caterpillar under lease in the sum of $250.00; they had failed to pay for groceries in the sum of $43.03; they had failed to pay the royalty that was due on August 2, 1942, clean-up in the sum of $432.00; they had failed to pay for the Caterpillar parts in the sum of $45.65; and they had failed to pay for the bill paid by Mike Stepovich to Waechter Brothers in the sum of $128.34. The total of these sums were paid in full on the 8th day of August, 1942, as shown by said Exhibit.

In considering the appellants' theory of the case it is also necessary to consider the creditor's claim which was filed by appellants (Tr. pp. 112, 113, 114, 115), which was filed on the 6th day of July, 1945, almost three years after the date of the alleged breach of contract. At no time during the lifetime of Mike Stepovich or up to and including the signing of this claim was any claim ever made according to the testimony in this case by appellants that they had suffered a loss of $20,000.00 for gold which they pretended had been taken from the dump by Mike Stepovich. It seems peculiar to say the least that no claim or statement was ever made in regard to values in the dump of $20,000.00 until the Complaint was filed in this action.

Furthermore in considering this theory of the case we must consider the Bill of Sale from Paul Drazenovich to James Zukoev, Nick Kupoff, Mike Kitoff and Nick Kobak dated August 6, 1942. (Tr. pp. 95, 96, 97, 98.) Paul Drazenovich started working on this claim shortly after the lease was signed and continued work-

ing until he sold his interest on August 6, 1942. According to the testimony of the two witnesses, Nick Kupoff and James Zukoev (Tr. pp. 48 and 129) they claimed to have found the rich pay streak on or about the 1st day of August, 1942. If there was such a pay streak, it seems strange that Paul Drazenovich would sell his interest for $1.00 and other valuable considerations, and no other considerations other than the $1.00 were claimed to have been paid by the appellants to the said Paul Drazenovich. If they had paid anything they would probably have alleged the amount as damages. Furthermore, if Mike Stepovich had instituted the action as claimed by them for the purpose of ousting appellants from the claim so that he could recover the ore which could be extracted, he made no attempt to extract the gravel and recover the gold which appellants claimed could have been recovered if they had not been ejected. The only way to determine a man's purpose in doing something if it depends upon his future acts is to show his future acts, and no claim was made that Mike Stepovich during his lifetime ever did any mining on this claim or extracted any gold therefrom.

There was nothing in the claim filed in regard to money contained in the dump in the sum of $20,000.00. All that was claimed was expense money for preparing the shaft and claim for mining in the sum of $6,791.29 and anticipated profits for the balance of the term of the lease in the sum of $100,000.00. It is our contention that appellants are limited to the amounts claimed under the claim filed. They followed the pro-

cedure as prescribed by the Alaska Code in filing the claim and after the claim was disallowed they had a right under the Code to be heard by the District Court. From the ruling of the District Court they had a right to appeal to the Circuit Court of Appeals. What the Court should have done unless a jury was demanded was to have heard the matter and either allowed or disallowed the claim, but instead of that and notwithstanding our demurrer to the Second Amended Complaint, the Court proceeded to call a jury and hear the evidence. We are not questioning the right of appellants, however, to a jury trial, but we do insist that the motion for an instructed verdict was properly granted.

The evidence shows according to the testimony of Nick Kupoff (Tr. p. 57) and the statement (Tr. p. 52) shows that $4,296.00 was extracted by appellants from said mining claim during their operations. The yardage of gravel extracted is not shown and no attempt was made by appellants during the trial of the case to show the number of yards by competent witnesses or to show the value per yard. Neither was any attempt made to show values of gravels contained in the claim. Attorney for appellants attempted to show values in drill holes in a ground adjacent to the claim which was, of course, properly excluded by the Court upon objection. The only evidence offered was by the two appellants who testified that they recovered a few pans that went as much as $1.50 per pan, and from that evidence there and that evidence alone appellants expected the case to be submitted to the jury

and the jury allowed to guess as to the amount of yardage and as to the values per yard. This the Court refused to do.

In appellants' Brief the Court is blamed for not admitting incompetent, irrelevant and immaterial testimony and the claim is made that they were prevented from proving damages. As a matter of fact the Court did his best to inform appellants as to what was necessary to prove in order to make out a case for damages. During the trial the Court informed the attorneys that it was necessary for them to show the yardage, the value per yard and the cost of extracting the same in order to prove damages. (Tr. p. 91.)

The testimony of the only other witness besides the two appellants is the testimony of Joseph Ulmer and he testified that he had no knowledge as to the values contained in the gravels. He also attempted to testify by hearsay testimony as to drill holes in the vicinity of the claim in question, which testimony was properly excluded by the Court.

There was no evidence introduced which supports appellants' contention that Mike Stepovich filed the action against appellants for no other purpose than to collect what was due him for the use of his Caterpillar tractor and for the bills to the various merchants in Fairbanks which had been contracted by appellants and which they admitted were due and owing. The only fair and reasonable conclusion in regard to the assignments of these claims in view of the facts of the case is that Mike Stepovich felt a moral

responsibility to see that these merchants were paid, as the appellants were engaged in mining on the property of Mike Stepovich. If appellants had believed that after August 2 when the third clean-up was made and the 21st day of August, 1942, when the attachment was levied that they had taken out gravel containing $20,000.00 in values that they would have done nothing to recover two-thirds of the $20,000.00, and furthermore, if in a period of less than three weeks they could take out $20,000.00 and have reason to believe that there was $150,000.00 in the ground which they could have extracted, they would surely have done something during the summer of 1942 to assert their rights under the lease and Paul Drazenovich would not have sold his undivided one-fifth interest. Certainly Mike Stepovich if he had wanted to recover this money which they claim was in the ground would have employed miners to extract the gravel. If Mike Stepovich recovered the $20,000.00 which they claim was in the dump there would have been some record in the bank in Fairbanks or at the mint because under the law in force and effect at the time, gold could not be sold and was required to be sent to the United States Mint, and evidence of such a fact was easily obtainable.

The Alaska statute herein referred to which was copied from the laws of Oregon which prevents a fraud of this kind being perpetrated upon the heirs of a decedent without some corroborating evidence should certainly be applied in a case of this kind. In the first place, no action for more than two years was taken

by appellants during the lifetime of the said Mike Stepovich. In the second place, the claim was filed and nothing was said about the conversion of any money by the said Mike Stepovich. No attempt was made to prove any actual damages and the claim itself was filed only for the anticipated profits and no actual or real attempt was made to show any profits.

As attorneys for the estate we can not waive the question presented by our motion to dismiss the appeal for the reason that the notice was not filed in the time prescribed by law. We contend that the motion for an instructed verdict was properly granted under the law and for lack of proof and corroborative evidence and for failure to bring the action within the time provided by law. We contend that the action as alleged is in tort and not for breach of contract.

For the reasons stated we believe that the decision of the District Court should be affirmed.

Dated, Fairbanks, Alaska,
July 12, 1950.

Respectfully submitted,
JULIEN A. HURLEY,
MIKE STEPOVICH, JR.,
Attorneys for Appellee.

Service of a copy of the foregoing Brief for Appellee admitted this 12th day of July, 1950.

WARREN A. TAYLOR,
Attorney for Appellants.